Criminal Procedure Code, as amended by the Criminal Procedure Code (Amendment) Ordinance, 1952.

Held: the proviso to section 399(i) of the Criminal Procedure Code is a condition precedent and if it is not complied with the document cannot be admitted under the section; (2) in this case the document was wrongly admitted in evidence and that wrongful admission was an irregularity, which could not be cured under section 422 of the Criminal Procedure Code.

CRIMINAL APPEAL.

A. J. Braga for the appellant.

M. Suffian (D.P.P.) for the Public Prosecutor.

Cur. Adv. Vult.

Storr, J.: — In this appeal Mr. Braga for the appellant argued a point of law which did not form one of the grounds of appeal filed under section 307(vi) of the Criminal Procedure Code, but as it had been communicated to the learned Deputy Public Prosecutor before the hearing, I decided to hear the arguments and, if necessary, act under my powers of revision under section 325 Criminal Procedure Code.

Mr. Braga's submission was that a witness for the prosecution produced an unproved document (i.e. a certificate of the Government Chemist — Ex. P10 —) which was wrongly admitted as evidence by the learned President presumably under section 399(i), Criminal Procedure Code, and that that wrongful admission of evidence amounted to an illegality and therefore the conviction should be quashed and the sentence set aside, as without this unproved document there was no evidence against the appellant to support the charge. Inche Suffian, the learned Deputy Public Prosecutor, submitted that the wrongful admission of the certificate amounted to an irregularity that could be cured by section 422, Criminal Procedure Code.

If section 399(i), Criminal Procedure Code, did not exist, a report of the Government Chemist could only be proved by calling him as a witness to produce it. Section 399(i), Criminal Procedure Code, is in effect a departure from the ordinary procedure of proving documents in a Court and is obviously enacted to save the party wishing to use as evidence a report of the persons named the trouble and expense of calling such persons as witnesses to prove the report. There is, however, a proviso which to my mind is a condition precedent to the convenience allowed by this section. If that condition precedent is not complied with, then the document must be proved in the usual way and the prosecution or the party wishing to produce the document cannot take advantage of the section.

In the present case the document (a certificate from the Government Chemist) was produced by a prosecution witness and admitted by the learned President without the prosecution who tendered it having complied with the proviso to section 399(i); it was therefore wrongly admitted. The certificate (Ex. P10) is an unproved document and the production of such by a witness for the prosecution amounts to an illegality. Without that document I can find no evidence on the record to support the conviction.

Acting under my powers of revision, I quash the conviction and set aside the sentence.

Conviction quashed; Sentence set aside.

ISAAC PENHAS v. TAN SOO ENG.

[P. C. (Lord Merriman, Lord Normand, Lord Oaksey, Lord Reid and Lord Asquith of Bishopstone) February 17, 1953]

[Privy Council Appeal No. 21 of 1951]

Marriage — Validity of marriage of a Jew to a non-Christian Chinese lady — Modified Chinese form of marriage ceremony — Common Law monogamous marriage — Intention — Mixed marriage between domiciled inhabitants of different religions or races — Validity of — Charter of 1826.

This was an appeal from a judgment of the Court of Appeal of the Colony of Singapore (reported in (1950) M.L.J. 104) dismissing an appeal by the appellant from a judgment of Mr. Justice Gordon-Smith (reported in (1949) M.L.J. 223) upon the trial of an issue ordered to be tried in a Petition by the respondent for letters of administration of the estate of Abraham Penhas deceased against which the appellant had entered a caveat.

The said issue was in the following terms: "Whether the petitioner Tan Soo Eng is or is not the lawful widow of Abraham Penhas and if the answer is in the affirmative when the said Tan Soo Eng married the said Abraham Penhas". Both the learned trial Judge and the Court of Appeal decided the said issue in favour of the respondent, determining that she had been lawfully married to the deceased on or about the 22nd December, 1937. From their decisions the appellant appealed to the Judicial Committee of the Privy Council.

The principal question to be decided was whether there was in 1937 anything in the religions, manners or customs of Jews or Chinese domiciled in Singapore which prevented them from contracting a common Law monogamous marriage.

Held (dismissing the appeal): the Common Law of England was in force in Singapore in 1937 except in so far as it was inapplicable and except in so far as it was necessary to modify it to prevent hardships upon the inhabitants who were entitled by the terms of the Charter of 1826 to the exercise of their religious manners and customs.

Their Lordships agreed with the view expressed by Evans, J. in the Court of Appeal in the present case that in a country such as Singapore where priests are few and there is no true parochial system, where the vast majority are not Christians, it is neither convenient nor necessary that two persons such as the respondent and the deceased should be required to call in an episcopally ordained priest to effect a marriage.

There was no form of a ceremony of marriage in the present case which was applicable to both parties to the marriage and accordingly they seem to have adopted a composite ceremony, the wife worshipping

according to her Chinese custom and the husband according to his Jewish custom. Such a ceremony performed in the circumstances already stated was indubitably intended by the parties to constitute a valid marriage, and their Lordships held that the evidence sufficiently proved a Common Law monogamous marriage.

Cases referred to :—

(1) *Yeap Cheah Neo v. Ong Cheng Neo* (1875) L.R. 6 P.C. 381; S.L.R. Leic. 569; 1 Ky. 326, 337 (P.C.).

(2) *Carolis De Silva v. Tim Kim* (1902), 9 S.S.L.R. App. 8.

(3) *Wolfenden v. Wolfenden* (1946) P. 61; (1945) 2 All E.R. 539.

PRIVY COUNCIL.

R. J. A. Temple, Q.C., *Ian Baillieu* and *H. Forbes* for the appellant.

P. Colin Duncan and *A. L. Gordon* for the respondent.

The judgment of their Lordships was delivered by :—

Lord Oaksey : — This is an appeal from a judgment of the Court of Appeal of the Colony of Singapore dated the 24th March 1950, dismissing an appeal by the appellant from a judgment of Mr. Justice Gordon-Smith in the High Court of the Colony of Singapore dated the 13th September, 1949, upon the trial of an issue ordered to be tried in a Petition by the respondent for letters of Administration of the estate of Abraham Penhas deceased against which the appellant had entered a caveat.

The said issue was in the following terms: "Whether the petitioner Tan Soo Eng is or is not the lawful widow of Abraham Penhas and if the answer is in the affirmative when the said Tan Soo Eng married the said Abraham Penhas." Both the learned trial judge and the Court of Appeal decided the said issue in favour of the respondent, determining that she had been lawfully married to the deceased on or about the 22nd December, 1937.

The question to be determined upon this appeal is whether the learned trial Judge and the Court of Appeal were right in their conclusion that a marriage celebrated in Singapore between a Jew and a non-Christian Chinese in a modified Chinese form constituted a valid marriage according to the laws of the Colony.

Both the deceased and the respondent were British subjects and were at all material times domiciled and resident in Singapore. Neither of them was married at the date of the marriage ceremony relied upon by the respondent in December, 1937. From the date until the deceased was murdered by the Japanese shortly after the fall of Singapore in February, 1942, they lived together as man and wife and had two children.

The appellant is a brother of the deceased and was the executor of the last will and testament of the deceased which was executed on the 3rd April, 1936. He has not applied for probate of the said will.

Abraham Penhas the deceased who was born in 1897 was a member of the family firm of Rahamin Penhas carrying on business in Singapore and in the year 1936 went to England on a world tour. There he met a Jewess whom he wished to marry but as his father did not consent he returned to Singapore unmarried.

In the following year he employed a Eurasian lady as a go between with a view to marriage and she introduced him to the respondent and her mother. They met in the Botanical Gardens of Singapore and conversed in Malay. Abraham asked the respondent's mother if she would consent to a marriage between him and the respondent and the respondent's mother stipulated that it must be a proper wedding. He gave the respondent $500 to establish herself and her mother in a more suitable house than that in which they were then living and he visited them for a few months at the house they took.

The respondent's evidence continued :—

"One day when he visited me he said that since we were temperamentally compatible we should have an early marriage. I suggested a Church Ceremony. He said such was not possible in the Jewish Synagogue — because they would not allow any but Jews to go in. Then I suggested a marriage according to Chinese rites and he asked for details and I told him — An appointed day, before friends and relatives as witnesses, and of course my mother would be there."

* * * * * *

"We decided to have the marriage in my house at Sims Avenue and according to Chinese rites. He was to pay the expenses. The date fixed was in December 1937, 3 or 4 days before Christmas. Friends and relatives gathered together and deceased came at 11 a.m. with 3 of his friends, to 508 Sims Avenue.

One was an old Chinese gentleman and 2 Jews. I don't know their names but could recognize them. I have not seen them since the marriage. There were 16 or 17 guests, including his 3 guests. The old Chinese gentleman brought by deceased solemnized the marriage. We stood before him. We worshipped the Heavenly God and I worshipped with Joss Sticks and he asked us each separately whether we were willing to be man and wife, and we both said Yes.

Deceased put a handkerchief over his head while I worshipped. I bowed twice (curtsied) (stooped) holding joss sticks (illustration by witness) and worshipped to Heaven.

Deceased told me it was their custom to put a handkerchief on the head.

He raised his right hand the whole time while I was worshipping. I was murmuring a prayer to Heaven for long life.

I could not understand what he was murmuring, it was in his language.

After worshipping, his two Jewish friends shook hands with me and deceased also shook hands with me and kissed me. This ceremony was in the outer Hall and we then went into the inner Hall — My mother was sitting in a Chair.

We both went before her — I knelt down and deceased bowed, and then offered her a cup of tea — according to Chinese custom. We had a feast immediately afterwards. After the feast the old Chinese gentleman gave us his blessing before he left. He came to live with me at Sims Avenue, passing 3 to 4 nights there per week but he came there every day. After that he permanently resided in Singapore — but would sometimes go up-country on business but would tell me so before going. He would write to me when away."

In cross-examination the respondent said :—

"The meeting in the gardens lasted about ¾ hour. Mother was there, Mamma (the go between) and deceased. He proposed a marriage straight away. He asked my mother if she had any objection to his not being a Chinese. My mother's reply was there was no objection provided there was a proper marriage."

The respondent's mother also gave evidence and said *inter alia* :—

"The three of us, deceased, daughter and self, had a discussion about the marriage. Deceased one day, on a visit, asked my daughter: 'Shall we not be married?' and my daughter said 'at any time'. He said a ceremony could not possibly be performed in the Synagogue and my daughter said it would have to be according to Chinese custom.

'Abe agreed' and a date was then fixed. He said we could invite our friends and relatives and he would invite his.

He gave $500 for the expenses.

On the wedding day he came with three friends, one an old Chinese gentleman and 2 Jews. Our friends were present and it took place at Sims Avenue.

When he came, my daughter was upstairs but hearing his voice, she came down and the old Chinese gentleman congratulated her. The 2 Jews smiled and spoke to her in English but I did not understand.

Then he and my daughter stood side by side before the Chinese gentleman and the latter spoke, referring to the auspicious occasion, etc., etc., and finally asked both of them if they were willing to marry each other. Both of them answered: 'Yes.' Then he said: 'You are now husband and wife and I wish you a happy and life-long union.' "

* * * * * *

"My daughter suggested a ceremony in Church but deceased said a Jew was forbidden to enter. (Interpreter corrects it and says she says 'a place of worship' and that witness suggested the Synagogue.)

Deceased replied that the Jewish Synagogue his place of worship could not be entered except by Jews. Deceased said this and my daughter suggested marriage according to Chinese rites. He agreed. I do not remember that she suggested a marriage according to Jewish rites outside a Synagogue. That is all I can remember of the discussion."

The pastor in charge of the Chinese Christian Church also gave evidence and said that the respondent was already an attending member of his Church when he took up his duties there in 1939 : that he visited her at her house after meeting her at Church : that he met her husband Abraham Penhas there and was introduced by him to the respondent as his wife and saw a little girl there whom Abraham introduced as his child and that he subsequently baptised their second child with their consent.

Upon these facts both Courts in Singapore have held that the respondent was the lawful widow of the deceased Abraham Penhas.

The appellant's counsel however contends firstly that the Christian Marriage Ordinance of Singapore 1936 was applicable to the parties and that no marriage was valid unless celebrated in accordance with that Ordinance.

Secondly that the deceased had not the capacity to contract a polygamous marriage; thirdly that the ceremony adopted was of such a character that it could give rise only to a polygamous marriage; fourthly that there is no evidence which justified the inference that there had been a valid Common Law marriage; and lastly that the equivocal nature of the ceremony and the other evidence did not establish the *consensus ad idem* necessary to prove a valid Common Law marriage of a monogamous nature.

Their Lordships do not find it necessary to set out the provisions of the Ordinance of 1936 as they think it clear that the Ordinance only applies to marriages in which one of the parties is a Christian and it is not suggested that either party to the marriage in question was a Christian at the time. It is clear that at the material time no ordinance comparable with the Civil Marriage Ordinance of 1940 was in force. Nor do they think it necessary to deal in detail with the question whether a Jew domiciled in Singapore has capacity to form a polygamous marriage as to which no evidence was given or with the contention that the ceremony adopted which was not entirely in accordance with Chinese rites was only consistent with or raised a presumption of a polygamous marriage.

In the year 1875 their Lordships' Board had occasion to review the history of the Straits Settlements in the case of *Yeap Cheah Neo v. Ong Cheng Neo*[1] and held that the English Common Law was in force in Singapore in so far as it is applicable, but that the Charter of 1826 provided that the Court of the Colony was to exercise jurisdiction as an Ecclesiastical Court in so far as the religions manners and customs of the inhabitants will admit.

The principal question to be decided is therefore whether there was in 1937 anything in the religions manners or customs of Jews or Chinese domiciled in Singapore which prevented them from contracting a Common Law monogamous marriage. No case has been cited which suggests that mixed marriages between domiciled inhabitants of different religions or races cannot validly be contracted. On the contrary the case

of *Carolis De Silva v. Tim Kim*[2] is authority that they can and indeed the appellant's counsel did not contend that such marriages were impossible.

In accordance with these decisions their Lordships hold that the Common Law of England was in force in Singapore in 1937 except in so far as it was inapplicable and except in so far as it was necessary to modify it to prevent hardships upon the inhabitants who were entitled by the terms of the Charter to the exercise of their religions manners and customs.

Their Lordships agree with the view expressed by Mr. Justice Evans in the Court of Appeal in the present case that in a country such as Singapore where priests are few and there is no true parochial system, where the vast majority are not Christians, it is neither convenient nor necessary that two persons such as the respondent and the deceased should be required to call in an episcopally ordained priest to effect a marriage. The case of *Wolfenden v. Wolfenden*[3] and the cases there cited are in point and were in their Lordships' opinion rightly decided.

There was no form of a ceremony of marriage in the present case which was applicable to both parties to the marriage and accordingly they seem to have adopted a composite ceremony, the wife worshipping according to her Chinese custom and the husband according to his Jewish custom.

Such a ceremony performed in the circumstances already stated was indubitably intended by the parties to constitute a valid marriage. The only question which in their Lordships' view admits of any doubt is the question whether the marriage intended by the parties to be constituted by the ceremony was a Common Law monogamous marriage or a Chinese polygamous marriage.

This question was not raised in the Courts below and no questions were put to the respondent in cross-examination on the subject. Abraham Penhas was dead and in such circumstances it would, in their Lordships' opinion, be altogether wrong to invalidate a marriage so solemnized followed as it was by years of cohabitation as man and wife and to bastardize the two children of the marriage, even if the other evidence were equivocal as to the status intended. But it is not necessary to decide the case on this narrow ground for their Lordships hold that the evidence as it stands sufficiently proves a Common Law monogamous marriage. The wishes expressed by the respondent and her mother for a Church marriage, the reason why a modified Chinese ceremony was substituted, the presence of Jewish friends at the ceremony, the words spoken by the Chinese gentleman who performed the ceremony as to a life-long union, the cohabitation as man and wife followed and continued till the husband's death and the introduction by the deceased to a Christian pastor of the respondent as his wife and last but not least the baptism of their children as Christians with the approval of their father all indicate that the spouses intended to contract a Common Law monogamous marriage.

Their Lordships will therefore humbly advise Her Majesty that this appeal ought to be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

COMMISSIONER FOR LABOUR for and on behalf of TAY CHOON KEONG v. CHOP CHOONG JOO.

[Workmen's Compensation (W. G. Alcock, Commissioner) March 10, 1953]

[Singapore — C.W.C. No. 182 of 1952]

Workmen's Compensation Ordinance (Cap. 70), ss. 12 and 15 — Definition of "workman" in s. 2.

A male workman by the name of Tay Choon Keong alleged to have been employed by the respondent on the 27th day of January 1951 received personal injury by accident arising out of and in the course of his employment. The cause of injury was that he fell to the ground from a plank while taking goods from a twako to a lorry. Tay Choon Keong sustained a fractured spine — paralysed from waist down (100% loss of earning capacity). He claimed a lump sum of $4,800.

The respondent denied that the applicant workman was employed by the respondent. It was alleged by the respondent that the applicant was in fact employed by one Tan Bak Chok to do work for which the said Tan Bak Chok was occasionally engaged by the respondent.

The following Issues were framed:

1. Was the applicant in the employ of the respondents?
2. If not, can the respondent be made liable under section 15 of the Ordinance?
3. In either case, was the applicant a person whose employment was of a casual nature and who was employed otherwise than for the purpose of the respondent's trade or business so as to disentitle him for relief under the Ordinance in view of the definition of "workman" in section 2 of the Ordinance?
4. If the respondent is held to be liable, was adequate Notice of the accident given under section 12 of the Ordinance and was the claim for compensation made within the proper time under that section?
5. As to quantum of compensation, what were the wages of the applicant?

The case was argued on three issues: (i) was the applicant in the employment of the respondent; (ii) was adequate notice given under section 12 of the Ordinance and the claim made within the proper time; (iii) the amount of wages. The respondent did not press the third issue and the second issue was not argued as being unnecessary for the determination of the case.

Held: (1) the applicant fell from a plank on 27th January 1951 while engaged in unloading cargo from a lighter at Boat Quay, Singapore, and suffered injury; that he was a workman employed by the respondent at the time of the accident; that notice not having been